pean courts and the Federal Circuit has disturbing implications for trans-Atlantic balance.

ARGUMENT

From a European perspective, the decision below creates numerous troubling anomalies.

First, it allows the U.S. Department of Commerce to practice a zeroing methodology that is inconsistent with a treaty to which both the United States and those other nations are parties.

Second, it conflicts directly with the decision of a Binational Panel convened under the North American Free Trade Agreement ("NAFTA") that zeroing as practiced by the United States is inconsistent with the Antidumping Agreement. The conflict does not pertain to technical issues about zeroing, but rather to the fundamental question whether the *Charming Betsy* doctrine has any role at all to play within the *Chevron* framework by which U.S. courts decide whether to accept or to overturn agency interpretations of ambiguous statutes. The existence of two irreconcilable decisions addressing the very same *U.S.* authorities (*Charming Betsy* and *Chevron*), as applied to the same subject matter (zeroing), is entirely unsatisfactory from the standpoint of nations that must comply with the same treaties that bind the United States, and companies such as petitioner that must comply with U.S. law in their international commercial dealings.

Third, the decision below reflects an approach to treaty obligations entirely incompatible with the way the European Court of Justice approaches the exact same problems. In neither the Community nor the United States is the Antidumping Agreement given direct effect – that is, in Europe as in the United States a domestic court may not *invalidate* domestic legislation for incompatibility with the WTO Agreements, including the Antidumping Agreement. Yet the Community courts understand that they still have a role to play in ensuring the *consistency of interpretation* of domestic legislation with international obliga-

tions in general and the WTO Antidumping Agreement in particular. It is very troubling that in the United States courts should be less vigilant in ensuring such consistent interpretation than the courts of one of its main trading partners.

I. Zeroing Should Not Be Permitted In The United States While Forbidden In The European Community

The European Community and the United States are subject to the same obligations to comply with the Antidumping Agreement. As matters now stand, however, zeroing is impermissible in the Community following the *Bed Linen* report but permissible in the United States, according to the decision below, even after the *Softwood Lumber* report of the Appellate Body.

Both the United States and the European Community are Members of the WTO, an international organization comprising 148 Member countries. The WTO is designed to handle trade disputes, monitor national trade policies, and administer the WTO agreements. World Trade Organization, *at* http://www.wto.org. The Agreement Establishing the World Trade Organization ("WTO Agreement") incorporates various instruments, including the Antidumping Agreement. Both the European Community and the United States are parties to the Antidumping Agreement. Congress adopted the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA"), amending the Tariff Act, which now closely tracks the language of the Agreement.[6] The Statement of Administrative Action ("SAA") accompanying the URAA "is an authoritative expres-

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[6] Compare Antidumping Agreement (in calculating dumping margins, a "*fair comparison* [must] be made between the export price and the normal value," Pet. App. 126a (emphasis added)) with Tariff Act, 19 U.S.C. § 1677b(a) (in assessing whether foreign merchandise is being sold, or is likely to be sold, at less than fair value in the United States, "a *fair comparison* shall be made between the export price or constructed export price and normal value") (emphasis added).

sion of the United States concerning interpretation and application of [the WTO Agreements] in any judicial proceeding." 19 U.S.C. § 3512(d). The SAA states that the URAA was "intended to bring U.S. law fully into compliance with U.S. obligations under the [WTO] agreements." SAA, H.R. Doc. No. 103-316 (1994) at 669. This is fully in line with Article 18(4) of the Anti-dumping Agreement, which states that each Member shall "take the necessary steps * * * to ensure * * * the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement."

The Appellate Body of the WTO has found that the "inherent bias" in zeroing "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[7] In *EC – Bed Linen*, a challenge to the Community's use of zeroing, the Appellate Body concluded that "a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions * * * is *not* a "fair comparison" between export price and normal value."[8] The European Community has since abandoned the practice. Recently, the Appellate Body affirmed that zeroing is inconsistent with the Agreement in a case challenging the United States' use of the practice. In *Softwood Lumber*, the WTO Appellate Body concluded that, by failing to take into account the "*entirety* of the *prices* of *some* export transactions," zeroing "inflates the margin of dumping for the product as a whole."[9]

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[7] Report of the Appellate Body, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, ¶ 135 (Dec. 15, 2003).

[8] Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/AB/R, ¶ 155 (March 1, 2001) ("*EC - Bed Linen*") (Pet. App. 143a).

[9] Report of the Appellate Body, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R,

Yet the courts below upheld the application of zeroing to goods imported from Europe.

For reasons too obvious to require elaboration, this is a matter of great concern to the Commission. Furthermore, it is the kind of anomaly that has concerned this Court in the past. In interpreting ambiguous treaty language, this Court accords "considerable weight" to the judgments of fellow governments that jointly adopt a treaty with the United States. *Air France* v. *Saks*, 470 U.S. 392, 404 (1985). Foreign constructions of treaty language constitute relevant evidence of the shared understanding of the treaty signatories, and thus may be helpful in maintaining a consistent and coherent international body of law concerning the treaty. See *Olympic Airways* v. *Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting).

II. Two Tribunals Have Construed U.S. Law In Irreconcilable Ways

The NAFTA Binational Panel in the *Softwood Lumber* case confronted essentially the same question that was before the Federal Circuit in this case: whether the *Chevron* doctrine requires acceptance of the Department's position as reasonable in the face of the *Charming Betsy* doctrine and persuasive reports of the WTO Appellate Body confirming that zeroing is inconsistent with the Antidumping Agreement. The Federal Circuit concluded that judicial review of the reasonableness of the Department's position should be conducted in a vacuum, with no effort to avoid the possibility of a treaty violation because the political branches had sole authority over all matters of treaty compliance. The Binational Panel, by contrast, concluded that the Appellate Body reports, though nonbinding in U.S. law, were persuasive. The Binational Panel held that the choice between two interpretations of an ambiguous statute was not strictly one for the Department to make as it saw fit, but rather required

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¶ 101 (Aug. 11, 2004) (Pet. App. 134a) (emphasis in original).

consideration of the *Charming Betsy* doctrine and the need to avoid a conflict with the law of nations. Based on those considerations, the Panel concluded that it is unreasonable to interpret U.S. statutes to authorize zeroing.

The Panel determined that the *Charming Betsy* principle was relevant to its review of an agency's interpretation of an ambiguous statute. As the Panel explained, "*Chevron* is not the only test a court or panel applies in reviewing a challenged agency interpretation of an ambiguous statute. * * * An otherwise permissible agency interpretation (*i.e.*, one that passes *Chevron*) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law." *Panel – Softwood Lumber*, Pet. App. 102a (citing *Charming Betsy*, 6 U.S. (2 Cranch) at 118). Applying that principle, the Panel took into account the WTO Appellate Body's report in *Softwood Lumber*.

The Panel was well aware of the provisions of the URAA that make the Antidumping Agreement non-self-executing, forbid U.S. courts to invalidate statutes based on the Agreement, and leave questions of implementation of WTO Appellate Body reports to the political branches. See Pet. App. 102a-103a. "This Panel clearly lacks the power to directly implement the *WTO Softwood Lumber* Decision or any other decision of the [dispute settlement body]. * * * But the question before this Panel concerns the scope and effect of the *Charming Betsy* doctrine, which is a canon of U.S. law." Pet. App. 103a. Courts and panels have "the ability – indeed the responsibility – to consider WTO obligations in assessing the legality of agency action under *Charming Betsy*. U.S. agencies are bound to *interpret* statutes consistently with U.S. international obligations." *Ibid.* (citation omitted and emphasis added).

The Binational Panel pointed out the logical fallacy of the argument that, because WTO Appellate Body decisions are nonbinding in U.S. courts, they – and the treaty they construe – should be disregarded completely in deciding whether an *inter-*

pretation of an ambiguous statute is rendered unreasonable by the *Charming Betsy* doctrine (Pet. App. 104a (footnote omitted)):

> [T]he relevant international legal obligation * * * is sourced in a treaty, and not in any decision of the [dispute settlement body], and exists before, during, and after completion of the dispute settlement process in the WTO *Softwood Lumber* Decision. The WTO *Softwood Lumber* Decision does not itself cause the challenged United States measure (zeroing) to be in conflict with the Antidumping Agreement or any other international legal obligation of the United States for purposes of *Charming Betsy*. Rather, it establishes with considerable authority that the measure is so in conflict, which makes application of *Charming Betsy* more assuredly correct.

The Panel likewise pointed out the logical fallacy in the argument that, because the URAA precludes giving effect to provisions of the treaty that are "inconsistent with any law of the United States" (19 U.S.C. § 3512(a)), neither the treaty nor authoritative interpretations of the treaty may be invoked to invalidate a mere agency *interpretation* of an ambiguous U.S. statute:

> The challenge here, as was the case in *Corus Staal*, does not involve the application of any "law of the United States." Section 3512(a) deals with statutes, and as such is not directly relevant to this proceeding. * * * [Z]eroing is not mandated by any U.S. statute. Zeroing is a discretionary agency determination which must be consistent with United States international legal obligations in order to be lawful *as a matter of United States law*, unless there is a statutory override of those obligations.

Pet. App. 105a (emphasis added). The Panel added (*id.* at 119a):

> Our decision does not purport to change U.S. antidumping law; rather it applies U.S. antidumping law (as appropriately determined through *Charming Betsy*) to agency action.

> * * * The limitation imposed by Section 3512, of course, only applies to statutes, not to agency action. The URAA does not render *Charming Betsy* unavailable as a rule of statutory construction.

Thus, the Binational Panel considered three sources of *U.S.* law – the *Chevron* doctrine, the *Charming Betsy* doctrine, and the provisions of the URAA that limit judicial power to effectuate the Antidumping Agreement – and reconciled them all. As the Panel determined, it is possible to *interpret* an *ambiguous* statute in conformity with the international treaty obligations of the United States without giving direct effect to the Antidumping Agreement or running afoul of any prohibition of the URAA. Doing so conforms with the *Charming Betsy* doctrine. And doing so does not run afoul of the *Chevron* doctrine, because step two of *Chevron* does not require that agency interpretations of ambiguous statutes be deemed *reasonable* (and thus upheld) when another doctrine of U.S. law renders them *unreasonable* (and thus improper). The decision of the Binational Panel strikes the European Commission as a far more successful reconciliation of these different strands of U.S. law than the decision of the Federal Circuit.

Indeed, it strikes the European Commission that this Court has already indicated that courts in this situation should take the Binational Panel's approach and not the Federal Circuit's approach. In *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 567 (1988), this Court considered an agency interpretation of an ambiguous statute that would have been, but for the application of other tools of statutory construction, upheld as reasonable under *Chevron*. See 485 U.S. at 574 (citing *Chevron*, 467 U.S. at 842-843 & n.9) ("That statutory interpretation by the Board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress."). Yet the Court, without dissent, rejected the agency's interpretation precisely because it could not be reconciled with a rule first announced in the *Charming Betsy* case:

> Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate.

485 U.S. at 575 (citation omitted). The principle of constitutional avoidance used to inform the application of *Chevron* in *DeBartolo* was in that case concerned with avoiding problems under the First Amendment to the U.S. Constitution, not with avoiding problems under an international treaty. But Article VI of the U.S. Constitution makes "Treaties," no less than "This Constitution," the "supreme Law of the Land." And that is precisely why the *Charming Betsy* opinion, which discusses avoiding conflict with "the law of nations" and does not otherwise discuss avoiding conflict with the Constitution, is a proper citation for the doctrine of constitutional avoidance. In other words, to treat the *Charming Betsy* doctrine as irrelevant in a *Chevron*-type case involving a treaty – as the Federal Circuit did – but relevant in a *Chevron*-type case involving purely domestic law seems to give the doctrine the least effect in the very context in which it was announced in the first place.

Just last year, this Court observed that the *Charming Betsy* rule "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 124 S. Ct. 2359, 2366 (2004). The application of *Charming Betsy* by the judiciary "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 2366. In various areas of law this Court "ha[s] recognized the principle that the scope of

generally worded statutes *must* be construed in light of international law." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 816 (1993) (Scalia, J., dissenting) (emphasis added) (citing *Charming Betsy* and other cases).

It therefore strikes the European Commission that the Binational Panel, not the Federal Circuit, has the better of the debate about the degree to which U.S. law requires deference to agency interpretations of ambiguous statutes when those interpretations would raise questions under international treaties. Regardless of whether that conclusion is correct, it is certainly true that two utterly irreconcilable pronouncements on U.S. law now exist from the two bodies with authority to apply U.S. law to international trade disputes of a sort that is of very great interest to the Commission. See Pet. 2-3. The Commission respectfully submits that this Court should resolve the conflict.

III. As European Courts Understand, Treaty Obligations That May Not Be Given Direct Effect May Nevertheless Strongly Inform The Interpretation Of Ambiguous Statutes

The decision of the court below stands in stark contrast to – but the Binational Panel decision comports with – the approach Community courts have followed concerning the relevance of international obligations in the interpretation of domestic statutes.

In Europe, as in the United States, some but not all treaties are self-executing. In particular, just as the URAA rules out "direct effect" for the Antidumping Agreement to overturn a provision of U.S. law, so too in the Community a paragraph of the preamble of the decision approving the Agreement rules out direct effect of the Agreement in the internal legal order of the Community. Decision 800/94, OJ 1994, L 336, last paragraph of the preamble; see Pieter Jan Kuijper & Marco Bronckers, *WTO Law in the European Court of Justice*, 42 COMMON MKT. L REV. 1313, 1314 & n.2 (2005). This was confirmed by the European Court of Justice in Case C-149/96, *Portugal* v.

Council, 1999 ECR I-8395, ¶ 47. In Europe, as in the United States, legislative action has "'transpose[d]' the WTO agreements virtually integrally into" statutory law that courts *are* authorized to interpret. Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1315. Indeed, Member States were obliged to take measures to bring their domestic statutory law into conformity with the WTO Agreements. *Ibid.*

In Europe, as in the United States, case law establishes a doctrine – known as "consistent interpretation" or the presumption against conflict between national and international law – that ambiguous statutes should be interpreted in conformity with the law of nations. As Jennings and Watts put it: "As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict." 1 ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 81-82 (9th ed. 1992). Thus, "where a provision in municipal [*i.e.*, national] law is amenable to different interpretations, it must be construed to conform to international obligations." Patricia Egli & Juliane Kokott, *European Community – WTO Agreements – Effect of International Agreements in European Community Law*, 94 AM. J. INT'L L. 740, 745 (2000). "This principle has also been recognized since the early days of the American Republic by the Supreme Court under the name of the 'Charming Betsy' doctrine, but" – because of the Federal Circuit's decision in this case – "its application to the WTO Agreement is uncertain." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1316-1317.

In Europe, as in the United States, WTO Appellate Body decisions are not binding beyond the parties to the dispute "and thus have no general application." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1328. A party that argues that a

European court is *bound* to implement an Appellate Body report therefore would lose the argument.

In Europe, as in the United States, non-judicial governmental bodies charged with the implementation of statutory schemes may be given deference. In the area of anti-dumping law in particular, *amicus* the European Commission always has "broad discretion * * * in such economic matters regarding the interpretation of WTO law when dealing with a complaint. To this end, the [European] Court [of Justice] interprets the WTO law and decides whether the Commission could have reasonably come to its interpretation of the law." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1324. In other words, a doctrine much like *Chevron* deference applies to interpretation of the European legislation that is the counterpart to the URAA.

The European Court of Justice, like the Binational Panel in the *Softwood Lumber* case and the Federal Circuit in the decision below, have had to consider how to apply these doctrines to WTO Agreements. The European Court of Justice has taken essentially the approach of the Binational Panel – requiring that ambiguous statutes be interpreted consistently with the law of nations – and have not deferred to otherwise-authoritative interpretations of domestic law when to do so would raise questions of treaty violations. "With respect to the WTO, the first Court cases which drew a refusal from the Court to contemplate direct effect, also yielded a confirmation of the principle of consistent interpretation." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1329. For instance, in *Hermès International*,[10] the Court of Justice applied the principle of consistent interpretation in connection with a provision of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). In that case, the Court held that:

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[10] Case C-53/96, *Hermès Int'l* v. *FHT Marketing Choice BV*, 1998 ECR I-3603.

> since the Community is a party to the TRIPS Agreement and since that agreement applies * * *, the courts * * * when called upon to apply national rules * * *, are required to do so, as far as possible in the light of the wording and purpose of Article 50 of the TRIPS Agreement.[11]

The European Court of Justice has reaffirmed this doctrine several times. In *Schieving-Nijstad*[12] and *Parfums Christian Dior*,[13] the Court emphasized that, although the provisions of WTO Agreements "are not such as to create rights upon which individuals may rely directly before the courts" (no direct effect), nevertheless "the finding that the provisions [of a treaty] do not have direct effect in that sense does not fully resolve the problem."[14] Rather, the Court relied on the ruling in *Hermès International* that, under the principle of consistent interpretation, courts in the Community must interpret national laws "as far as possible" in light of the relevant international treaty.[15] In other words, the European Court of Justice has taken exactly the approach that the Federal Circuit refused to take in the decision below – it has recognized that obligations under the WTO Agreements have a significant role to play in determining whether an agency interpretation of a domestic statute (designed to fulfill an international obligation) is a reasonable one that the courts should accept, and that the absence of "direct effect" of those

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[11] *Id.* ¶ 28.

[12] Case C-89/99, *Schieving-Nijstad vof et al.* v. *Groeneveld*, 2001 ECR I-5851, ¶¶ 35, 55.

[13] Cases C-300/98 and C-392/98, *Parfums Christian Dior SA* v. *Tuk Consultancy* v. *BV / Assco Geruste GmbH et al.* v. *Layher GmbH & Co.*, 2000 ECR I-11307, ¶ 47.

[14] *Dior*, ¶¶ 44, 45.

[15] *Dior*, ¶ 47; *Schieving-Nijstad*, ¶ 35.

international obligations is not a reason to disregard the obligations altogether in interpreting statutes.

The Community and its Member States, as well as the United States, chose to transpose the WTO Agreements into "domestic" law without allowing for direct effect. Insofar as such transposition of an international agreement into national law almost inevitably creates ambiguities, it is extremely important that – in the words of this Court – "*courts* [of the United States] should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements," lest the United States jeopardize its status "as a trusted partner in multilateral endeavors." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (emphasis added). By insisting that only the political branches, and not the judiciary, have a role to play in ensuring treaty compliance, the Federal Circuit took an approach inconsistent with that principle and with the *Charming Betsy* doctrine. The European Court of Justice, construing Community and Member State law in light of the same non-self-executing treaties the Federal Circuit construed, reached a different conclusion. Such asymmetry between trusted trading partners merits this Court's attention.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2005

* Admitted in New York and Ontario; admission pending in the District of Columbia.